Supreme Court, U.S.
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Nos. 98-569, 98-574

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

AMSTERDAM VIDEO INC., *et al.*,

Petitioners,

-v.-

THE CITY OF NEW YORK, *et al.*,

Respondents.

RACHEL HICKERSON, DEREK JONES, TY McCONNELL, and ELLIOT STAMLER,

Petitioners,

-v.-

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITY RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. Pursuant to the full faith and credit statute, 28 U.S.C. § 1738, and this Court's precedent, was the Second Circuit's affirmance of the denial of a preliminary injunction proper on the grounds of the application of issue preclusion or collateral estoppel, where there was extensive litigation in New York state court, plaintiffs' chosen forum, culminating in a final determination by New York's highest court, the New York Court of Appeals, in *Stringfellow's v. City of New York*, 91 N.Y.2d 382 (1998), which made findings of fact and law, and employed the standards set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in upholding the City of New York's adult use zoning ordinance?

2. In any event, given the controlling precedent in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opin.), was the denial of a preliminary injunction proper where the challenged adult use zoning ordinance is facially valid under the First Amendment of the United States Constitution given that it is content-neutral, narrowly tailored to serve important governmental interests, and provides reasonable alternative means of communication?

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COUNTER-STATEMENT OF THE CASE

Respondents, the City of New York, *et al.* ("the City"), respectfully request that this Court deny the petitions by the separate petitioners, Amsterdam Video, Inc., *et al.* ("*Amsterdam*") and Rachel Hickerson, *et al.* ("*Hickerson*") (collectively, "petitioners"), for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 3, 1998 (A-3-32).[1] The Second Circuit affirmed a judgment of the District Court for the Southern District of New York, which denied a preliminary injunction against enforcement of the City's adult use zoning ordinance based on application of the full faith and credit statute, 28 U.S.C. § 1738, and the law of issue preclusion or collateral estoppel, given the New York State courts' rejection of petitioners' claims. *Hickerson v. City of New York*, 146 F.3d 99 (2d Cir.), *aff'g*, 997 F. Supp. 418 (S.D.N.Y.), *stay denied sub nom. Amsterdam Video v. City of New York*, 119 S. Ct. 4 (1998) (A-3-32, A-33-44).

In relevant part, following extensive litigation, the State's highest court, the New York Court of Appeals, rendered a final determination upholding the City's adult use zoning ordinance, including findings of fact and law. *Stringfellow's v. City of New York*, 91 N.Y.2d 382 (1998) ("*Stringfellow's*") (A-45-67). In rejecting petitioners' free expression claims under the New York Constitution, it applied the standard for validity of an adult use zoning ordinance set forth by this Court

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[1] To avoid unnecessary duplication, numbers and letters in parentheses preceded by "A-_." refer to the Appendix to the Petition for a Writ of Certiorari filed by the *Amsterdam* petitioners, while the separate *Hickerson* petitioners' Appendix will be referred to as "_a," only for material not contained in the *Amsterdam* Appendix. Numbers in parentheses preceded by the letters "JA" or "SA" refer to pages in the Joint Appendix ("JA___") or the Supplemental Appendix ("SA __") in the Second Circuit.

in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) ("*Renton*"), which is, in all material respects, identical to the New York constitutional standard. Thus, upon review of the extensive legislative record, the State courts found that the ordinance is content-neutral, imposes a measured set of land use restrictions on those adult establishments that have consistently been shown to produce negative secondary impacts, and that there are ample reasonable alternative avenues of communication.

Given the identity of the federal and state standards, the Circuit correctly held that, under the full faith and credit statute and governing precedent, including *Allen v. McCurry*, 449 U.S. 90 (1980) and *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), the New York courts' findings are dispositive of the federal constitutional issue based upon well-settled principles of issue preclusion or collateral estoppel.

Background of the Legislation.

The background facts are summarized in the Circuit's opinion (A-8-9, 12-13). Further discussions are contained in the State court opinions in *Stringfellow's* (A-45-67, 95-122a; *post*, pp. 11-15) and the Circuit's opinion upholding the ordinance in *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir.), *cert. denied*, 119 S. Ct. 54 (1998) ("*Buzzetti*").

The extensive legislative record leading up to the passage of the Amendment to the New York City Zoning Resolution governing adult use establishments illustrates its reasonableness (JA931-94). In brief, in recent years, growing concerns were expressed by City residents and their elected officials as to the significant proliferation of sexually-oriented adult entertainment establishments and their adverse community impacts,

particularly in residential areas. In response, the City's land use planning bodies, the Department of City Planning ("DCP") and the City Planning Commission ("CPC"), conducted a thorough analysis of whether the City should adopt zoning regulations of adult establishments (JA916-17, SA6-7).[2]

The DCP's Adult Entertainment Study ("the DCP Study"), completed in the fall of 1994, contains a survey of adult use studies performed by many other municipalities, as well as prior City studies and DCP's own survey of selected study areas (JA918, SA8-15). The DCP Study concluded that adult entertainment constituted a serious, growing problem and recommended restrictions (JA918). As detailed in *Buzzetti,* the DCP Study (*id.*, 140 F.3d at 136):

> noted that studies from other cities had documented numerous "negative secondary impacts of such establishments, including "increased crime rates, depreciation of property values, deterioration of community character and the quality of urban life." DCP Study at 67. These effects were consistent with the experience of those areas of New York City marked by high concentrations of adult entertainment establishments . . . Even in areas where adult establishments were not heavily concentrated,

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[2] Such establishments include adult book and video stores, which often provide booths for on-premises viewing, adult theaters, which may offer movies or live entertainment, and topless or nude bars. Once found predominantly in Times Square and a few other areas, adult establishments more recently opened and proliferated in neighborhoods where they had not previously been located, including numerous triple-X video stores and nude bars in or near residential neighborhoods in the City, such as Chelsea, Sunset Park, Sunnyside and Forest Hills (JA916, SA6-7, 19).

residents, businesses, and community leaders feared the consequences of possible future proliferation ....

After the City Council enacted a one-year interim zoning moratorium in 1994, and based upon the DCP Study and thorough public hearings, the CPC issued a detailed report and approved the permanent comprehensive Zoning Amendment (SA15-20; JA971; *Buzzetti*, 140 F.3d at 136). After further public hearings, on October 25, 1995, the City Council approved the Amendment, effective that date (SA21).

The Permanent Adult Use Zoning Amendment.

The permanent adult use Zoning Amendment ("the Amendment") does not forbid the operation of any category of business, but instead restricts the zoning areas in which an "adult establishment" may be operated (124-34a; JA918-19, 120-41). An adult establishment is defined, *inter alia*, as a commercial establishment which is: an "adult book store," an "adult eating and drinking establishment," an "adult theater," or "other adult commercial establishment." N.Y.C. Zoning Resolution ("ZR"), § 12-10. These establishments "regularly feature" or devote a "substantial portion" of their stock-in-trade to entertainment or material that is "characterized by an emphasis on" "specified anatomical areas" or "specified sexual activities," which terms are also defined in § 12-10 (SA21). Identical or similar definitions are used in many of the adult use zoning ordinances throughout the country (SA21-22).

The centerpiece of the Amendment is a set of locational restrictions and anti-concentration provisions that are designed to shield the City's residential neighborhoods, and the facilities and commercial areas that serve them, from the negative impacts produced by adult uses (JA919, SA23). Even before

these regulations were adopted, the general regulatory scheme embodied in the Zoning Resolution prohibited new commercial development in residentially-zoned districts (*id.*). Under the Amendment, adult uses are barred from certain districts zoned for commercial and manufacturing uses, but which also permit new residential development (ZR, §§ 32-01[a], 42-01[a]).

Adult establishments continue to be allowed in all high-density commercial and virtually all manufacturing districts that are mapped throughout the City and in which a wide variety of retail, entertainment and other commercial uses are permitted (ZR, §§ 32-01[b], 42-01[b], SA24-25, *post*, pp. 8-9). In these districts, however, they must be located at least 500 feet from any school or house of worship and from most zoning districts in which new residential uses are allowed (*id.*). To prevent concentration, a new adult use must be located at least 500 feet from any other adult use (ZR, §§ 32-01[c], 42-01[c]).[3]

Background of the Actions.

These parallel actions were commenced in New York Supreme Court in February 1996 (JA20, 197, 921). The *Amsterdam* plaintiffs are owners or operators of adult establishments, while the *Hickerson* plaintiffs are customers

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[3] Aside from some exceptions with respect to certain pre-existing adult uses (ZR §§ 32-01[b].[f], 42-01[b].[f]), the Amendment generally required existing non-conforming adult establishments to come into conformity or terminate within one year of the effective date, *i.e.*, by October 26, 1996 (*id.*, §§ 52-734, 52-77; JA496-97). It also provided that, upon a timely application with the requisite showing by an owner of a non-conforming adult establishment, the City's Board of Standards and Appeals could allow it to be maintained for more than one year from the effective date (ZR § 72-40; SA25-27). Neither petitioners or any other business chose to make a proper and timely application (A-65-66).

thereof (JA921-22).[4] Both complaints asserts deprivation of the rights of free expression under the State and Federal Constitutions, with 13 of the 14 causes of action in the *Amsterdam* complaint alleging purely State constitutional violations (JA20-112, 113-15; *see also* JA172-98).

In March 1996, defendants removed the actions to District Court pursuant to 28 U.S.C. § 1441 (JA15-19, 167-71, 922).

Vigorously objecting, plaintiffs sought a remand to State court (JA209-34, 254-56). They argued that State court was their chosen forum to litigate all their claims, both state and federal, that the state law claims predominated, and that the New York Constitution affords expressive activity greater protection than the Federal Constitution (JA228, ¶¶ 47-48).

For example, the *Amsterdam* plaintiffs' counsel's supporting affirmation states that the federal issue is "minor and subordinate (JA228 ¶ 48), and that their state constitutional claims "predominate[d]," while their First Amendment claim was a mere "adjunct" or "supplement" (JA227, quoted by Circuit at A-24-25). Their legal memorandum also stated that: "No credible claim can be made that a federal court is in a better position than the New York State court to inquire into

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[4] The named City defendants are the City of New York, Mayor Rudolph W. Giuliani, Gaston Silva, Commissioner of the Department of Buildings, and Joseph B. Rose, the CPC Chairperson and DCP Director (JA46-47, 174-76). The separate intervenors-defendants are the Times Square Business Improvement District and the Center for the Community Interest, among other community groups (JA1015, 1237).

the adequacy and suitability of [the alternative] sites" (*Amst.* Mem., 4/96, p. 20).[5]

On June 27, 1996, the District Court remanded all the state law claims, retaining jurisdiction over the federal claims, but staying adjudication thereof. *Hickerson v. City of New York*, 932 F. Supp. 550 (S.D.N.Y. 1996) (A-68-86).

The Extensive State Court Litigation.

Following the remand, the *Amsterdam* and *Hickerson* actions were assigned to Justice Marylin G. Diamond and were informally consolidated with a third action challenging the Amendment, *Stringfellow's v. City of New York* (JA922).

In July 1996, following a preliminary injunction motion by the *Stringfellow's* plaintiffs, and upon the City's indication that it would cross-move for summary judgment upholding the *prima facie* validity of the law, all the parties and the Court agreed upon a briefing schedule to resolve the matter by October 26, 1996, the effective date for compliance after the one-year amortization period (*Stringfellow's* Appen. at A1673-74). In August 1996, in accord with the schedule, defendants cross-moved for summary judgment declaring the Amendment valid (JA922-23). Plaintiffs then filed papers to reserve their federal claims under *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964) (JA309-15).

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[5] So too, the *Hickerson* petitioners stated: "Here, the plaintiffs' principal claim is that the New York City zoning ordinance violates . . . the New York Constitution," reducing to a footnote that they "also" asserted federal claims (*Hick.* Mem., 4/16/96, p. 9 & n.3), and that they should be able to litigate their claims, which "should be decided by the State courts," in "their chosen forum" (*Hick.* 5/21/96 Reply Mem., pp. 3, 4).

The City submitted supporting affidavits by several City Planning officials: Joseph B. Rose, CPC Chairperson and DCP Director (SA4-29), William Bernstein, DCP First Deputy Executive Director (SA30-38), and Andrew Lynn, DCP Executive Director (SA39-43). It also submitted virtually the entire several thousand page legislative record before the City Council (which included the DCP Study and CPC Report), and a series of detailed maps (JA923).

In addition to the legislative background (*ante*, pp. 2-5), these affidavits detailed how the Amendment provides ample access to adult entertainment and materials (JA920-21, SA27-28). Adult establishments may operate in all high density commercial and virtually all manufacturing zoning districts, that are mapped throughout the City, and which areas permit a broad range of retail, amusement, recreational and other commercial and industrial uses (112-14a; SA31-38).[6] These areas include portions of midtown Manhattan, a large swath along its West Side, Sunset Park, Brooklyn, northern Astoria and other parts of Queens, the South Bronx and the western shore of Staten Island (SA32-38).

These districts are well-served by major highways, thoroughfares and mass transit, and DCP showed that all of the permissible Manhattan areas, and at least 80% of such areas in the other boroughs, are within a 10-minute walk of a rapid transit line or major bus route (SA32).

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[6] As the State Supreme Court found, the in-depth examination of Manhattan, including six districts below 59th Street, where about 100 adult establishments were operating, and where 75 may remain, is "especially compelling" (112-14a; SA33-34). The Court also found that that "specific analysis belies" plaintiffs' bald allegations of being forced into outer boroughs (113a).

In addition, DCP calculated that the areas in which adult uses are permitted are more than 11% of the City's total land area, and about 4% of the area when reduced by certain properties unlikely to be developed for commercial use (SA28, JA989). DCP estimated that the Amendment allows for the operation of approximately 500 adult establishments, each of which may have up to 10,000 square feet of usable floor area (SA28, JA989).[7] Given that about 177 adult establishments were operating in the City and the fact that the vast majority of those establishments occupy far less than 10,000 square feet, the Amendment not only permitted all of the existing adult establishments to continue to operate, either at their current sites or new locations, but also accommodated a significant expansion of the adult use market (SA28-29, 38, JA950-51).

The City also demonstrated that its manufacturing districts are very suitable for new commercial development and that the City encourages a mix of commercial and industrial uses and activity therein (SA40-41). As a general matter of land use policy, the City's Zoning Resolution permits almost all commercial uses -- retail, office, service and entertainment -- in manufacturing districts, and a significant amount of commercial activity takes place in these districts (SA40-41). These districts contain an ample amount of property available at affordable prices, with about 22% of the property characterized as vacant land or buildings (SA41-42).

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[7] This estimate takes into account the locational restrictions, as well as discounting as potential sites certain properties that are unlikely to be developed for any commercial use, referred to as "encumbered" areas (SA28). These areas include those occupied with public utilities or oil storage facilities; property designated as wetlands by the State Department of Environmental Conservation; publicly-owned vacant property of more than 10,000 square feet; areas under active consideration for rezoning that would prohibit adult uses; and sites fronting on built roadways (SA28).

Even though a summary judgment motion ordinarily stays discovery, N.Y. C.P.L.R. §§ 3212(a), 3214(b), particularly in facial legislative challenges, nonetheless, at plaintiffs' urging, the State Court allowed some discovery to be conducted prior to decision, while continuing to deny indefinite extensions to the agreed schedule. At the Court's direction, defendants, *inter alia*, answered interrogatories and provided pre-enactment maps that showed the areas where adult uses are permitted when encumbered areas are eliminated (JA974-75, SA42-43).

In addition, while the Court had entered an order on August 22, 1996 denying further discovery without leave, thereafter, upon the *Hickerson* plaintiffs' application, it granted leave and directed defendants to produce for deposition a person familiar with DCP's calculation of the total number of adult establishments permitted. On September 3, 1996, defendants produced Marilyn Mammano, DCP's Director of Zoning and Urban Design (JA974-75, 849-910), who supervised the staff who actually performed the calculation, which was done prior to enactment (JA872, p.87).[8]

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[8] Ms. Mammano explained that DCP had prepared maps of each borough, which showed the permissible areas, the locations of "sensitive receptors," such as schools and churches, and the properties that were unlikely to be developed for any commercial uses, *i.e.*, the "encumbered" areas (JA851-95, SA42-43). The maps were prepared by computer, using data from various government sources and the results of field surveys by DCP staff, who had personally visited many of the areas (JA861, p. 46, SA42-43). Using those maps and a scaled measuring device, DCP staff measured 500 foot intervals along the street network within the areas where adult uses were to be permitted, but excluding the encumbered areas and areas surrounding sensitive receptors. DCP estimated, conservatively, that about 500 adult establishments are allowed under the Amendment (JA973, p. 92; JA861-62, pp. 43-47; JA869, p. 75; JA956-57).

Notably, in response to defendants' motions, both the *Amsterdam* and *Stringfellow's* plaintiffs cross-moved for summary judgment (JA974). All plaintiffs submitted extensive opposing affidavits, including a lengthy 106-page affidavit of R. Bruce McLaughlin, a Florida-based land use planning consultant (A385-491). That affidavit consisted largely of broad conclusory allegations and legal argument about, *inter alia*, the alleged unsuitability of manufacturing districts for commercial use, as well as the alleged unsuitability of such areas as vacant land, parking lots, or property with existent leases (*id.*; *see* JA990-92).[9]

The Lower State Court Opinions.

By lengthy, well-reasoned opinion entered October 23, 1996, the State Supreme Court granted the City's cross-motion for summary judgment upholding the Amendment and dismissed the three actions. *Stringfellow's v. City of New York*, 171 Misc. 2d 376 (Sup. Ct., N.Y. Co. 1996) (95-122a). It upheld its validity under the New York Constitution based on *Town of Islip v. Caviglia*, 73 N.Y.2d 544 (1989) ("*Islip*"), which used standards parallel to *Renton* (102-105a).

First, the Court found that the voluminous legislative record provided ample evidence that adult establishments tend

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[9] Plaintiffs claimed insufficient time to respond, ignoring the agreed-upon schedule and the fact that other potentially relevant information was not within defendants' exclusive custody, such as public transit maps (JA958, 118-19a). As the State Courts also stressed: 1) plaintiffs commenced the actions some six months earlier and their counsel had actively participated in the long, open public review process preceding passage in October 1995; 2) their expert McLaughlin had familiarity with that process and had done a lengthy 198-page predicate study in August 1995 based upon a draft of the Amendment (A-63-65; 117a; JA492-690).

to produce certain negative impacts in the communities that surround them, and that the City's adult regulations were designed, not to suppress expression, but to address these *legitimate land use concerns* (106-10a). Thus, they were no broader than necessary to achieve their purposes (110-11a).

The Court also held that the regulations provided reasonable alternative avenues of communication or ample space throughout the City for adult establishments, citing both *Renton* and *Islip* (111-15a). The Court found that defendants' evidence, particularly the City Planning officials' affidavits, established, among other things, that: 1) adult establishments are permitted in a number of commercial and manufacturing zoning districts which permit a wide range of retail, recreational, entertainment and other commercial uses; 2) the districts are well-served by both mass transit and highways, with generally at most a 10-minute walk to a bus or subway line; and 3) incorporating all of the locational and separation requirements, about 500 adult establishments may lawfully operate in the City (far more than the 147 of 177 total establishments which would have to relocate) (112-15a).

Furthermore, plaintiffs did not come forward with legally sufficient countervailing evidence (115-19a). Having closely examined the affidavit of their expert McLaughlin, which contended that the number of available sites was much smaller than defendants' estimate, the Court found McLaughlin's methodology to be "fatally flawed" because he unjustifiably eliminated numerous sites based on such factors as use as a warehouse or parking lot, the undeveloped state of the site, presence of a long-term lessee, and lease clauses prohibiting adult uses (116-17a). Noting that the exclusion of such factors has been repeatedly rejected by state and federal courts,

including this Court in *Renton*, the State Court held that plaintiffs failed to rebut defendants' evidence, stating (117a):

> Although 10 months have passed since McLaughlin states he obtained zoning maps maintained by the DCP [*see* JA401, ¶ 37], he claims that he cannot estimate the acreage size of the permissible zones because of lack of time. He also fails to offer his own number of potential relocation sites under either the City's methodology or his own methodology to rebut the City's calculation.[10]

The Court concluded that plaintiffs failed to raise any issue of fact requiring a trial and that defendants were entitled to summary judgment (119a). After having allowed various discovery, the Court rejected requests for additional discovery in this facial challenge, finding the record "thorough, extensive and comprehensive" and that there was no showing that necessary information was in defendants' exclusive custody (*id.*). Thereafter, the Appellate Division unanimously affirmed, citing *Islip* and *Renton*. *Stringfellow's v. City of New York*, 241 A.D.2d 360 (1st Dept. 1997) (92-94a).

The New York Court of Appeals' Opinion.

On February 24, 1998, the Court of Appeals unanimously affirmed the order below, agreeing with the lower courts that the Amendment comports with state and federal constitutional standards governing adult uses, which are substantially the

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[10] The Court rejected the contention that the estimate was invalid because it was generated by computer and not by inspection of all of the actual sites, also noting that it was based on conservative measurements (118a).

same under *Islip* and *Renton*. *Stringfellow's v. City of New York*, 91 N.Y.2d 382 (1998) (A-45-67).[11]

Upon thorough review, the Court of Appeals held: "In view of the legislative record upon which the City Council rested its decision . . ., we agree with the courts below that enactment of the Amended Zoning Resolution was not an impermissible attempt to regulate the content of expression but rather was aimed at the negative secondary effects caused by adult uses, a legitimate governmental purpose" (A-58). It also found that the Amendment is no broader than necessary and is "a coherent regulatory scheme" which "protect[s] only those communities and community institutions that are most vulnerable to the adverse impacts of adult uses" (A-59-60).

Finally, employing the *Renton* standards, the Court of Appeals agreed that the Amendment left reasonable alternative avenues of communication available (A-61-65). The Court stated (A-62-63, quoted in Circuit opinion at A-15-16):

> Relying on a formula derived from *City of Renton v. Playtime Theatres*..., the federal courts have generally concluded that reasonable alternative avenues of communication exist if there is sufficient land area open for use by adult businesses "in all stages of development from raw land to developed, industrial warehouse, office and shopping space that

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[11] Plaintiffs' massive briefs totalled over 300 pages and fully discussed their preference to litigate in State court as their chosen forum (SA44-386). They argued that New York courts are more liberal on free speech than the federal courts (SA63, 76, 97), that reliance on *Renton* was "misplaced" and "unwarranted" (SA99, n.18, SA100, 126), and that *Renton* is not the law in New York (SA258). They also argued that they did not receive adequate discovery or a trial (SA226-40; 377-84, 119-36).

> is criss-crossed by freeways, highways and roads" (*id.*, at 53-54). Under *Renton*, land that is already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not to be automatically deemed unavailable. Further, any reduction in profitability caused by a forced relocation is not relevant to the availability inquiry [citations omitted]. Rather, the inquiry is limited to the *physical* and *legal* availability of alternative sites within the municipality's borders and whether those cites are part of an actual business real estate market (*see*, *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1530-31 [(9th Cir. 1993)], cert [.] denied [,] 511 U.S. 1030...[(1994)]; . . .).
>
> In determining whether proposed relocation sites are part of an actual business real estate market, the courts have considered such factors as their accessibility to the general public, the surrounding infrastructure, the pragmatic likelihood of their ever actually becoming available and, finally, whether the sites are suitable for "some generic commercial enterprise" (*see* [*Topanga*], 989 F.2d, at 1531).

The Court found that the evidence submitted by defendants established that, *inter alia*, under the regulations, at least 500 adult establishments will be able to operate within zoning districts "that permit a wide mix of commercial, retail, entertainment and manufacturing uses" (A-63). The Court found that the opposition's submissions did not contain "the hard factual data" necessary to refute any of that evidence and: "[g]iven this shortfall, the accuracy of the City's overall calculations was not called into serious question" (A-65).

The Federal Motions for Injunctive Relief.

Following the Court of Appeals' decision, plaintiffs sought a preliminary injunction in District Court enjoining defendants from enforcement. Their new affidavits included one from their expert McLaughlin, whose State court affidavit had failed to quantify the number of available sites. Within the five-day period given, he opined, for the first time, that there were only 90 available sites after excluding "unsuitable" sites (JA1019-75). Also submitted were a videotape and "transcript" of Mayor Giuliani's remarks at a February 24, 1998 press conference after the Court of Appeals' decision (JA911-14).

In their legal memoranda, plaintiffs acknowledged that the State courts made certain findings, including that: 1) the property where adult establishments may operate under the Amendment constitutes over 11% of the City's total land area and about 4% when reduced by encumbered properties that are unlikely to be developed for commercial use; 2) there are at least 500 potential sites for adult establishments to relocate and operate; and 3) all of the areas in Manhattan zoned for adult use and at least 80% of the land area in the other boroughs are within a 10-minute walk from a subway line or a major bus route (A-63; *Hick.* Mem., pp. 12-13; *Amst.* Mem., p.17, n.7). In the Circuit, they again acknowledged these findings, including that more than 500 potential sites exist (*Amst.* Br., p.35, n.15; *Hick.* Br., pp. 5, 7).

The City defendants opposed the motions by declarations of Albert G. Fredericks (JA915-30, SA1-3), with annexed exhibits including the State opinions (JA931-1014), the State court affidavits by City Planning officials (SA4-43), and plaintiffs' New York Court of Appeals' briefs (SA44-386). The City urged that there was no likelihood of success based

on the application of collateral estoppel and, separately, on the merits under *Renton* (JA927-30).[12]

THE DISTRICT COURT OPINION

On March 6, 1998, after ample oral argument, the District Court denied a preliminary injunction (A-33-44). In a thorough opinion, it held that plaintiffs did not show a likelihood of success on the merits, a showing "particularly appropriate where a municipal regulation has been carefully examined by all [the State courts], including the highest court, and its validity has been upheld under a state constitution that provides broad protection for individual rights" (A-34-35).

After reviewing the litigation history (A-35-39), the Court held that the issues presented were precluded by the factual findings and determinations of the State courts (A-39-44). Citing, *inter alia*, *Allen v. McCurry*, 449 U.S. 90, 96 (1980) ("*Allen*"), it noted the important purposes of collateral estoppel to protect ". . . litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy" and, where factual determinations by a state court are at issue, of "promot[ing] the comity between state and federal courts that has been recognized as a bulwark of the federal system" (A-39-40).

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[12] Defendants also noted that, upon examination of the new McLaughlin affidavit: (1) the new number could have been, but was never offered in state court (A-20 n.6); (2) McLaughlin's exclusions continued to suffer from the same legal infirmities unanimously found by all the State courts (*see* City Supp. D.Ct. Mem., 3/6/98). In particular, he eliminated property he found undesirable, such as property in industrial areas, vacant, undeveloped property, warehouses, parking lots, waterfront property, and property with long-term leases (JA1048-59), when such property has been consistently allowed as legally suitable in *Renton*, 475 U.S. at 53-54.

After reviewing the governing First Amendment standard set forth in *Renton*, and noting the extensive submissions reviewed by the State courts, the District Court held (A-40):

> Each of the inquiries set out by the Supreme Court in *Renton* -- the legislative purpose, whether the ordinance is designed to advance a substantial government interest, and the availability of reasonable alternative avenues of communication -- is a factual issue that has been litigated by plaintiffs and decided by the Supreme Court for New York County and affirmed by both the Appellate Division and the New York Court of Appeals.

The District Court rejected plaintiffs' argument that the *England* reservation of their federal claims barred application of issue preclusion, noting that plaintiffs' chosen forum was "emphatically" the state court and that they promptly sought a remand of all claims to their chosen state forum (A-41).

In then rejecting their argument that they were denied a full and fair opportunity to litigate in State court, the Court properly applied the controlling factors under New York law (A41-44). It recognized that the fact that a case is resolved on summary judgment does not deny a party a full and fair opportunity to litigate; a party is not entitled to unlimited discovery, and state court proceedings permitting no discovery can be entitled to preclusive effect (A-42). Further, "plaintiffs viewed the New York courts as the main forum and the New York Constitution as the principal basis for their . . . effort to prevent [the] City from requiring them to close and move their businesses" and were represented by experienced and highly competent counsel (A-42). Finally, they were permitted some

discovery and had a full opportunity to press their procedural grievances, and substantive claims, in State court (A-42).[13]

THE SECOND CIRCUIT OPINION

In a comprehensive opinion, on June 3, 1998, the Second Circuit unanimously affirmed the judgment (A-3-32). It held that the District Court did not abuse its discretion in denying a preliminary injunction because, based on the State court litigation, "plaintiffs are collaterally estopped from relitigating the issues that govern their First Amendment claim," and thus could not show "a likelihood of success" or even sufficiently serious questions on the merits (A-9-10).

In so doing, the Circuit reviewed the relevant case law and the full faith and credit statute, 28 U.S.C. § 1738, wherein '"Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so"' (A-10, *Allen*, 449 U.S. at 96). It agreed with the District Court that the issues and standards applied by the New York courts in rejecting the state constitutional challenge are the same that would be applicable to their First Amendment claim (A10-11,

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[13] The District Court noted that plaintiffs were allowed to take the Mammano deposition, which, despite their complaints, provided them with "a great deal of information . . . that they used to support their position, . . . including the degree of defendant[s'] investigation of alternative sites" (A-42-43). It detailed how the New York courts addressed the discovery demands, with Justice Diamond noting: "plaintiffs' expert had had zoning maps for 10 months before he made his submission in opposition to . . . summary judgment," but had failed to estimate either the acreage or number of potential relocation sites (A-43). It also recognized that the State Court of Appeals noted the extent of the discovery provided with the record in this facial challenge totalling more than 10,000 pages (A-43).

comparing *Renton*, 475 U.S. at 49-50 with *Stringfellow's*, 91 N.Y.2d at 396-97, 399-400, 402; *see* A54-55, 62-63).

Thereafter, noting that plaintiffs had repeatedly asserted in earlier stages that the New York courts applied more favorable standards to free speech claims than federal courts, the Circuit soundly rejected as "mistaken" and "unavailing" their new arguments that federal courts required greater proof as to the substantiality of the governmental interests and the availability of reasonable alternative avenues of communication (A-11-15). As to reasonable alternative avenues, the Circuit quoted at length the New York Court of Appeals' *Stringfellow's* decision applying the *Renton* standard (A-15-16, A-62-63). Thus, *Stringfellow's* held that, *inter alia*, as set forth in *Renton*, land "in all stages of development from raw land to developed, industrial, warehouse, office and shopping space . . ." is to be considered available, and also that land already occupied by commercial and manufacturing facilities and undeveloped land that is not for sale or lease is not automatically to be considered unavailable (A-15, A-62; *ante*, pp. 14-15).

The Circuit stressed that two federal cases that plaintiffs most heavily relied on, *Topanga*, *supra*, and *Woodall v. City of El Paso*, 49 F.3d 1120, 1124-25 (5th Cir.), *cert. denied*, 516 U.S. 988 (1995), were cited by the New York Court of Appeals (A-16-17). It rejected their further argument that there was a "serious analytic gap" between the evidence and the federal standards, expressly rejecting the far-reaching argument that federal law requires municipalities "to identify the *specific* physically and legally available relocation sites" and noting the lack of any case support for that proposition (A-17-18, italics in original). Because the Court of Appeals held that the City had to demonstrate proof of sufficient available alternative sites, the Circuit held that "to second-guess that

court's determination of this issue would violate the full faith and credit statute" (A-18).

The Circuit then reviewed the New York Court of Appeals' discussion of the City's evidence, including, *inter alia*, that 4% of unencumbered land and over 500 potential sites remain available, which encompasses a "wide mix of commercial, retail, entertainment and manufacturing uses," and the evidence of transportation accessibility (A-18). The Circuit stressed that the Court had amply considered plaintiffs' evidence, but had found it insufficient to raise material questions of fact (A-19). This was particularly because McLaughlin's analysis excluded areas that should have been included under *Renton*, such as industrial and warehouse areas and undeveloped land; even if some sites were "pragmatically" unavailable, plaintiffs did not adequately counter the evidence of enough land to cover the existent establishments where that evidence showed over 500 sites, approximately three times the existent number (A-19-20).

In sum, the Circuit held (A-21):

> "The state courts' determination that the McLaughlin Affidavit did not cast sufficient doubt on the City's evidence to preclude summary judgment --based largely on the Affidavit's failure to quantify the number of feasible sites, its reliance on premises that were invalid under *Renton*, and the persuasiveness of the City's own evidence-- does not, in short, represent a departure from federal standards. The full faith and credit statute therefore bars plaintiffs from relitigating the issue of alternative sites in federal court."

Furthermore, the Circuit held, "substantially for the reasons stated by Judge Cedarbaum," that plaintiffs did not meet their burden of proving that they were denied a full and fair opportunity to litigate their claims in State court (A-22). So too, the Circuit rejected their reliance on their *England* reservation as misplaced, given that *England* focussed on the problem of depriving a litigant who has "invoked" federal court jurisdiction from being deprived of that choice '"without his consent and through no fault of his own"'(A-23-27). It stressed that in subsequent case law, particularly *Allen*, this Court characterized *England* as applying "[w]here a plaintiff properly *invokes federal-court jurisdiction in the first instance* on a federal claim" (A-23, emphasis in original).

In contrast, here, plaintiffs did not invoke federal court jurisdiction in the first instance, but rather, following removal, vigorously fought to remand all their claims to State court and, only after the abstention order, filed an *England* reservation (A-24-25). The Circuit also agreed with those courts which have held, in light of *England*'s language and the *Allen/Migra* precedent, that *England* applies only to litigants who have sought to proceed in federal court in the first instance, and not to litigants who voluntarily chose to file in state court (A-25-26). Finally, the Circuit rejected plaintiffs' various other arguments opposing issue preclusion, and, therefore, vacated the stay and allowed "enforce[ment] forthwith" (A-27-29).[14]

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[14] On July 9 and 13, 1998, the Circuit denied the petitions for rehearing, with *en banc* suggestions; on July 22, 1998, it denied the *Amsterdam* petitioners' motion for a stay and issued the mandate (A-1-2, 1-3a). Following Justice Ginsburg's July 22, 1998 denial of their stay application, on July 28, 1998, this Court held that their further ". . . application for [a] stay addressed to Justice Souter and referred to the Court is denied." *Amsterdam Video v. City of New York*, 119 S. Ct. 4 (1998).

REASONS FOR DENYING THE WRIT

THE PETITIONS SHOULD BE DENIED BECAUSE THE SECOND CIRCUIT'S DECISION IS CORRECT UNDER THE FULL FAITH AND CREDIT STATUTE. THE APPLICATION OF ISSUE PRECLUSION WAS PROPER AND THE ADULT USE ZONING ORDINANCE DOES NOT VIOLATE THE FIRST AMENDMENT.

Upon review of the Second Circuit's opinion (A-3-32) and the other relevant opinions, petitioners do not raise any legal issue deserving review. Thus, the petitions should be denied.

The *Amsterdam* petitioners lead their argument with several off-base "jurisdictional" arguments. Their initial criticism is that the Circuit failed to discuss the jurisdictional consequences of the underlying abstention order under *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941) ("*Pullman*") and that there was a "blind application of the federal collateral estoppel doctrine" (*Amst.* Pet. at 15, 16-20).

These arguments are baseless. They demonstrate a fundamental misunderstanding of the full faith and credit statute and the importance of well-settled preclusion principles. As the comprehensive opinions show, upon review of the record, the Circuit carefully adhered to the governing legal preclusion principles consistently set forth by this Court. Indeed, the argument on the alleged effects of the *Pullman* order was not even presented to the Circuit or District Court.

In the instant case, the federal courts did not decline to exercise jurisdiction over the federal claims when, following the State court resolution of the state claims, petitioners returned to federal court. Rather, the federal courts exercised

their jurisdiction, but, upon review, determined that the claims could not be relitigated under the well-settled doctrine of issue preclusion or collateral estoppel.

Moreover, contrary to their suggestions, the State courts did not impermissibly exercise jurisdiction to resolve the federal claims (*Amst*. Pet. at 17), but rather exercised their indisputably valid jurisdiction to resolve the State claims. However, under the doctrine of issue preclusion, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("*Allen*").

Here, the New York State courts, including its highest Court, determined issues of fact and law necessary to resolve the free expression claim under the State Constitution, which paralleled the First Amendment claim. In so doing, the courts employed the legal standards set forth in *Renton* for determining the facial validity of an adult use zoning ordinance. On the ample record, the State courts found that defendants demonstrated that it is content-neutral, narrowly tailored to serve important governmental interests, and provides reasonable alternative means of communication.

Under the full faith and credit statute, 28 U.S.C. § 1738, which implements the full faith and credit clause, U.S. Const., Art. IV, § 1, federal courts must give the same preclusive effect to state court judgments as other courts within that state. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982). Accordingly, issues that were litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the state courts where judgment was rendered. *Allen*, 449 U.S. at 97-98;

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 82-84 (1984) ("*Migra*"). The statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. *Id.* at 84; *Baker v. General Motors Corp.*, 118 S. Ct. 657, 663-64 (1998) (reviewing history of full faith and credit clause and stressing that "regarding judgments, . . . the full faith and credit obligation is exacting . . . for claim and issue preclusion . . . purposes . . . the judgment of the rendering State gains nationwide force"); *see also Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996).

As the Circuit recognized (A-10), the statute, with the related preclusion doctrines, promotes finality of judgments and "the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 94-96; *Migra*, 465 U.S. at 84. "Such repose is justified on the sound . . . principle of judicial policy that a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Federal Sv. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991).

Despite their convoluted arguments, this case does not raise broad issues of notice or prejudice as to a party's ability to litigate their federal claims in federal court following a *Pullman* order or pursuant to an *England* reservation (*Amst.* Pet. at 18-19, 21-22; *Hick.* Pet. at 26). Petitioners vigorously fought to litigate their claims in State court, and then fully litigated their claims there, represented by experienced, competent counsel, knowing that the three-prong *Islip* and *Renton* tests were substantially the same. Their pitch that this Court should clarify the meaning of "full and fair opportunity" to litigate First Amendment issues (*Amst.* Pet. at 18-19) is

misguided. Indeed, this Court has found that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer*, 456 U.S. at 483. The District and Circuit's holdings on this issue were proper under ample case law (A-22; A-41-44).

Furthermore, cases subsequent to *England* have refused to treat that case as a broad exception to the preclusion doctrines of res judicata and collateral estoppel. In *Allen*, this Court made clear that issue preclusion is generally applicable in federal actions pursuant to 42 U.S.C § 1983. *Id.*, 449 U.S. at 95-96. This Court went on to indicate that the *England* rule is designed, not to allow the relitigation of issues already decided, but to preserve federal court jurisdiction over issues of federal law. *Id.* at 101 & n.17; *see Migra*, 465 U.S. at 84-85. Tellingly, petitioners' briefs do not acknowledge these important principles. *See also Dodd v. Hood River Co.*, 136 F.3d 1219, 1227 (9th Cir.), *cert. denied*, 142 L.Ed.2d 229 (1998) (previous *England* reservation does not "does not enable [parties] to avoid preclusion of issues actually litigated in the state forum").[15]

Moreover, contrary to their assertions (*Amst.* Pet. at 21), *Instructional Sys. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995), supports the application of issue preclusion here. The Third Circuit

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[15] As the Circuit noted (A-23), in *Allen*, 449 U.S. at 101 n.17, this Court stated: "The holding in *England* depended entirely on this Court's view of the purpose of abstention in such a case: Where a plaintiff properly invokes federal-court jurisdiction in the first instance on a federal claim, the federal court has a duty to accept that jurisdiction." *See* 17A. Wright, Miller, Cooper, *Fed. Prac. & Proc.*, § 4243, at 6 (1998 Pocket Part) ("The *England* procedure strictly speaking is applicable only if a case was begun in federal court.") *and* cases cited by Circuit at A-25-26.

reviewed *England* and expressly found that "the New Jersey courts were entitled to resolve the state law issues presented in the context of the declaratory judgment suit . . . and we are bound to accept their answer . . . as well as the factual and legal findings necessary to that answer." *Id.* at 823.

Petitioners also erroneously argue about the purportedly limited scope of any eventual review by this Court (*Amst.* Pet. at 20-21). Their extreme argument on this point would bar any application of issue preclusion based on state court litigation in any context, an absurd result. Furthermore, the Circuit correctly noted that this Court would be able to review the District and Circuit Court's determinations of federal law: "namely, that the issues decided and the standards applied by the New York state courts are the same as those that would be dispositive under the First Amendment" (A-29).

Revealingly, the *Amsterdam* petitioners suggest that the use of collateral estoppel has precluded them from arguing that the standard set in *Renton* should be changed or reconsidered, especially vis-a-vis the City (*Amst.* Pet. at 23-26). That same overreaching argument could be made in any case where collateral estoppel is applied and a party is unhappy with the result in the court where the issue was fully and fairly litigated. That does not, however, preclude the application of either claim or issue preclusion, which, as discussed above, has been codified by Congress and serves important policies respecting the comity of the state and federal courts (*ante*, pp. 24-25).

The *Hickerson* petition argues that the Circuit erred or "misconstrued" the decisions in *Renton* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality opin.) ("*Young*"), and that its ruling conflicts with the Ninth and Fifth Circuits' decisions in *Topanga* and *Woodall* (*Hick.* Pet. at 18-

24). These arguments fail. As our thorough review of the relevant opinions shows, the controlling principles of *Renton* were correctly followed by the Circuit and the New York Court of Appeals, which also harmonized the *Renton* precedent with various subsequent decisions, including *Topanga* and *Woodall* (*ante*, pp. 14-15) . Clearly, petitioners do not like the principle that adult businesses, as any other, must compete in the business marketplace, but that is the law. So too, they do not like the fact that a range of land "in all stages of development from raw land to developed, industrial, warehouse office and shopping space" are permissible areas and part of the relevant marketplace, but that, too, is the law. *Renton*, 475 U.S. at 54-55.[16]

Petitioners raise a few other meritless arguments as to why issue preclusion should not have been applied. Reliance on *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), as requiring an independent examination of the record in First Amendment cases (*Amst.* Pet. at 22; *Hick.* Pet. at 17, n.15), is misplaced. As the Circuit held, that case ". . . only concerns the proper level of *appellate* review, and

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[16] Notwithstanding that this Court does not to review factual issues, *post*, p. 30, petitioners argue that ". . . the relocation areas designated by the City in the state court proceedings cannot be considered reasonable by any standard" (*Amst.* Pet. at 25). That argument ignores the City's substantial evidence as to the commercial vitality and accessibility of the permissible areas and is at odds with *Renton* and its progeny (A-19). The persistent argument that there are "unique facts" because the City is "composed of five quite different boroughs" (*id.* at 23), has been consistently rejected (*see* A-18, n.5: Circuit states that the accessibility of potential sites in so-called "outer boroughs disposes of [the] argument, --which in any event, is without foundation and unsupported by case law-- that in contrast to the state courts' analysis, the First Amendment requires proof of adequate available sites on a borough-by-borough basis;" *see also* 113a).

does not bar the application of collateral estoppel" (A-27-28, italics in original). *See also Ferris v. Cuevas*, 118 F.3d 122, 125 & n.3 (2d Cir. 1997) (*Bose* standard inapplicable where the District Court's holding is procedurally-based on principles governing preclusion); *cf. Renton*, 475 U.S. at 53 n.3.

Furthermore, the alleged change in facts as to a statement made by Mayor Giuliani at a press conference following the New York Court of Appeals' decision, that the ordinance would severely limit the places adult establishments could relocate, does not meet the standard in *Montana v. United States*, 440 U.S. 147, 157 (1979) (*Hick.* Pet. at 24-25). As the Circuit recognized, *Montana* requires a significant change to the overall complexion of the record and the post-enactment press statement, "particularly when compared to the extensive legislative record compiled by the City[,]" does not meet that standard (A-28).

Finally, petitioners' presentations of the record and opinions are one-sided. At bottom, they attempt to argue factual or evidentiary issues which this Court does not sit to review. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"). Further, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

For example, despite the extensive State Court findings and their prior admissions, set forth above, the *Amsterdam* petitioners wrongly state: "No judicial findings of fact were

ever made" (*Amst.* Pet. at 9 ¶12). So too, the claimed inadequacy of the state proceedings (*Hick.* Pet. at 27-28) is belied by a review of the full record and this Court has consistently recognized the validity of the summary judgment process. *See, e.g., Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The allegations based on press accounts of the purported effects of the enforcement process (*Amst.* Pet. at 26-27; *Hick.* Pet. at 4) are outside the record and irrelevant.

As a final matter, an alternate ground supports the denial of the writ. On the merits, based on the controlling principles in *Renton* and *Young*, the denial of a preliminary injunction was proper because the adult use zoning ordinance is facially valid under the First Amendment.

Accordingly, based on all the above, the application of issue preclusion was proper under the full faith and credit statute and the adult use zoning ordinance does not violate the First Amendment.

CONCLUSION

THE PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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OPPOSITION

BRIEF

98-569 (3)
No. 98-574 (3)

DEC 3 1998

CLERK

IN THE

Supreme Court of the United States

October Term, 1998

RACHEL HICKERSON, DEREK JONES, TY MCCONNELL, AND ELLIOT STAMLER,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT AND CENTER FOR THE COMMUNITY INTEREST, *et al.*,

Respondents-Intervenors.

(Caption Continues on Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT-INTERVENOR TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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December 2, 1998

18 pp

(Caption Continued From Front Cover)

AMSTERDAM VIDEO, INC., *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT
AND CENTER FOR THE COMMUNITY INTEREST, *et al.*,

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STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

This is to certify that respondent-intervenor Times Square Business Improvement District has no corporate parents or non-wholly owned subsidiaries.

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Respondent-Intervenor Times Square Business Improvement District requests that the Court deny the petition for a writ of *certiorari* seeking review of an opinion of the Court of Appeals for the Second Circuit reported at 146 F.3d 99 (2d Cir. 1998).

SUMMARY OF THE ARGUMENT

No matter how petitioners clamor for a second bite at the apple, the fact is that the Second Circuit correctly resolved petitioners' First Amendment claim under the doctrine of collateral estoppel. Because the federal and state standards at issue are exactly the same, the unanimous decisions of the state courts to uphold the City's zoning ordinance were based on an inquiry into the *identical factual issues* pertinent to the federal Constitutionality of the Resolution: *i.e.*, the City's intent in enacting its zoning ordinance and the sufficiency of available locations for relocation. The failure of petitioners to produce evidence on these factual issues in state court doomed their First Amendment claim.

Petitioners, who avidly sought to litigate in state court, are not entitled to waste judicial resources and conduct repetitive litigation by abusing the reservation procedure set forth in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964). An *England* reservation is intended to benefit parties *forced* into state court, not those who vigorously sought to have the state courts litigate all their claims. Moreover, *England* applies to *claim* preclusion, and does not bar the effect of collateral estoppel with respect to factual issues decided in the state court. Thus, *England* has no bearing on petitioners' ability to re-litigate issues already resolved in the earlier proceedings.

Finally, the Constitutionality of New York's zoning Resolution is unambiguous. Sixteen judges, sitting in five different courts, have agreed that the Resolution is aimed at negative secondary effects rather than content, and that it provides petitioners with alternative avenues of communication

that amply satisfy the requirements of the First Amendment. Because the zoning ordinance falls safely within the Constitutional parameters explicated by this Court, this Court need not expend its limited resources to examine what was, in essence, a straightforward application of this Court's First Amendment doctrine as set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

REASONS FOR DENYING THE WRIT

THE SECOND CIRCUIT PROPERLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL.

A. A purported *England* reservation does not preclude the application of collateral estoppel on these facts.

Petitioners seek to frustrate the application of collateral estoppel by means of their purported *England* reservation. However, as this Court made clear in *England*, an *England* reservation is intended to protect parties *forced* to litigate in state court. *See England*, 275 U.S. at 415 ("[T]here are fundamental objections to any conclusion that a litigant *who has properly invoked the jurisdiction of a Federal District Court* to consider federal constitutional claims can be compelled, *without his consent and through no fault of his own*, to accept instead a state court's determination of those claims.") (emphasis added). Here, by contrast, petitioners unreservedly submitted both state and federal claims to the courts of New York State in the first instance, and vigorously fought to keep all their claims in that forum. *Cf. Migra v. Warren City Sch. District Bd.*, 465 U.S. 75, 85 n. 7 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 n. 17 (1980) (*England* applies where a party "invokes federal-court jurisdiction *in the first instance* on a federal claim") (emphasis added); *England*, 375 U.S. at 421 (stressing that, in abstention context, a party's *choice* of federal forum must be protected).

That a reservation of federal claims pursuant to *England* exists only for the benefit of parties forced to litigate claims in state court against their will is the unanimous view of the Courts of Appeals.[1] *See, e.g., Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1304-6 (11th Cir. 1992); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990); *Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir. 1988); *Fuller Co. v. Ramon I. Gil, Inc.*, 782 F.2d 306, 311-12 (1st Cir. 1986); *Tovar v. Billmeyer*, 609 F.2d 1291, 1293 (9th Cir. 1979) ("Appellants from the early days of their dispute with the City have sought to have their federal claims heard in a federal court.").

Here, by contrast, it was clear from the beginning that petitioners hoped that the state constitution would prove more helpful to them than the First Amendment as applied by this Court:

> That is why petitioners filed 13 state law claims in state court, with a sole federal claim that they themselves described as an "adjunct" to their state causes of action. *See, e.g.*, Brief of Amsterdam Video in Support of Motion to Remand at 28 ("[I]n our case, not only is the federal claim an adjunct to the state claims, but it is factual (*sic*) intertwined with the state charges"); Beth Haroules (for the Hickerson petitioners), Transcript of Oral Argument on Motion to Remand, at 7 ("Your honor, the federal claim is asserted as an adjunct to the state constitution.").

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[1] Certain of the federal courts of appeals consider the fact that a party filed first in state court to be dispositive, *see, e.g., Schuster v. Martin*, 861 F.2d 1369, 1373-74 (5th Cir. 1988), while others evaluate the totality of the evidence that a party was "forced" to litigate in the state court and the extent to which the litigant submitted to state court jurisdiction. *See, e.g., United Parcel Svc. v. California Public Utils.*, 77 F.3d 1178, 1186 (9th Cir. 1996). Not one appellate court, however, has intimated — nor could any, in light of *England*'s emphasis on protecting a party's *choice* of forum — that a party may proceed to federal court *regardless* of its intent to litigate the same claims in an earlier state proceeding.

That is why petitioners fought so vigorously to remain in state court when confronted with respondents' notice of removal to federal court.

That is why, in stark contrast to the position they take before this Court, petitioners assured the federal district court that: "No credible claim can be made that a federal court is in a better position than the New York State court to inquire into the adequacy and suitability of [the alternative] sites." Brief of Amsterdam Video in Support of Motion to Remand at 20.

That is why petitioners filed the affidavit of their expert, Robert McLaughlin, knowing full well that (as the state court found) it incorporated "the same methodology" that this Court had "specifically rejected" in *Renton. Stringfellow's v. City of New York*, 653 N.Y.S. 2d 803, 810 (N.Y. Sup. Ct. 1996) (*"Stringfellow's I"*).

Thus, petitioners can in no sense be said to have been *forced* to litigate in state court. To the contrary, petitioners filed all their claims in state court. Removal was effected only over their vehement protest and followed by a motion to remand in which petitioners proclaimed the adequacy of the state court to determine all their claims. *See Hickerson v. City of New York*, 932 F. Supp. 550, 556 (S.D.N.Y. 1996) (*"Hickerson I"*) ("[P]laintiffs' state claims are remanded . . . Plaintiffs, however, want more. They seek to have their federal constitutional claims decided by a state court.").

Moreover, even if it were applicable here, *England* only operates to preserve *claims* a party wishes to bring to the attention of the federal court, rather than *issues* that were necessarily resolved by the State court. *England* does not abrogate the requirement that federal courts rely on the resolution of issues resolved in an earlier proceeding. *See, e.g., Wicker v. Bd. of Educ. of Knott County*, 826 F.2d 442, 448-49 (6th Cir.1987) ("Even though [plaintiff] reserved his federal claims in state court, there still can be issue preclusive effect

accorded to both state court findings of law and findings of fact."); *Bradley*, 913 F.2d 1064 at 1073 ("As the Court recognized in *England*, even a litigant who has made a valid reservation may not relitigate an issue he/she unreservedly litigated in state court."). *See also* Restatement (Second) of Judgments § 86, cmt. f, illus. 7 (1982) (stating that factual issue litigated in state court may not be relitigated, although federal claims may have been reserved). Thus, even if petitioners had not vehemently insisted on litigating in state court — as they did — *England* would have no bearing on the final resolution of factual issues relevant to petitioners' federal claim.

B. Because the federal and state standards are the same, the Second Circuit properly applied collateral estoppel with regard to issues decided by the state court.

Given that *England* has no place here, the Second Circuit was correct to make its straightforward decision that petitioners' inability to withstand summary judgment in the state courts signaled a similarly fatal dearth of evidence with respect to petitioners' federal claim. Collateral estoppel is routinely applied by the federal courts where, as here, a prior decision was based on the same standards applicable to a later proceeding. *See Allen*, 449 U.S. at 94 (stating that federal courts traditionally have followed rules of issue preclusion and *res judicata*). As the Second Circuit rightly concluded, the courts of New York state have incorporated the federal free speech standard into state law. *See, e.g., Stringfellow's v. City of New York*, 694 N.E.2d 407, 415 (N.Y. Ct. App. 1998) (*"Stringfellow's II"*) (reviewing *Renton* and other federal precedents and extensively citing federal cases as well as parallel state opinions in support of ruling under state law).

Comparing the law of the two jurisdictions indeed reveals that the standards are identical. The New York state and federal free speech standards both subject a zoning regulation to the *same* two inquiries. First, the ordinance must be justified

by a purpose unrelated to content; specifically, the desire to combat negative secondary effects associated with adult establishments. *See, e.g., Renton*, 475 U.S. at 48 (stating that relevant question is whether the "predominant intent" of zoning law is "unrelated to the suppression of free expression"); *Stringfellow's II*, 694 N.E.2d at 415 (inquiry is whether ordinance is "purposefully directed at controlling the content of the message conveyed through adult businesses" rather than "aimed at an entirely separate societal goal"). Second, adult uses must be left with a reasonable opportunity to exist in the marketplace. *See, e.g., Renton*, 475 U.S. at 50 (ordinance must allow for "reasonable alternative avenues of communication"); *Stringfellow's II*, 694 N.E.2d at 418 (explaining that, under state law, ordinance must be "no broader than necessary" in that it "assure[s] reasonable avenues of communication," and that "ample space" must remain for adult uses).[2]

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[2] In a dramatic reversal of their position throughout the state court litigation, petitioners argue that the federal courts "require a more rigorous examination of alternative locations" than that deemed sufficient by the state courts. *See, e.g.*, Petition of the Hickerson Plaintiffs for Writ of *Certiorari* at 14. In fact, no federal court has required a showing of specific sites for relocation, as petitioners contend. Indeed, it would be impracticable to require cities to designate specific sites for relocation: since most zoning ordinances impose a distance requirement between adult businesses, where one adult business may locate depends in part on where another adult business has located.

Despite petitioners' criticism of New York City's evidence as overly "abstract," the City's designation of land in fact is indistinguishable from the assessment conducted by many of the federal courts cited favorably by petitioners. *See, e.g., Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995) ("[T]he collection of specific sites suggested by the City was but one possible arrangement of adult business locations that could coexist under the . . . Ordinance. . . . [V]irtually every site could be shifted to some nearby location without significantly upsetting other sites or reducing the total number of sites available."); *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992) ("Nothing in the instant record permits us to say that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure. . . . Thus, although the record does not

In the state court proceedings, petitioners failed entirely to raise any genuine, material issue of fact regarding the ability of New York's zoning Resolution to satisfy the two-prong standard set forth above. Put simply, petitioners cast doubt on neither the City's purpose nor the availability of alternate locations. As the district court noted, the virtually unrebutted evidence produced by New York City supported the following conclusions: (1) the City acted in response to concerns regarding the secondary effects of adult establishments; (2) the City reasonably relied on a number of studies to conclude that adult businesses produce adverse secondary effects; (3) the Resolution is no broader than necessary to prevent those adverse effects; and (4) the City "more than sufficiently demonstrated" that the permissible areas for adult establishments remaining in the City are suitable for commercial enterprise and are large enough to accommodate adult establishments which must relocate. *See Hickerson I,* 997 F. Supp. 418 at 423 (citing *Stringfellow's I,* 653 N.Y.S.2d at 803, 808, 809, 814).

In light of petitioners' inability to create doubt as to either of the two relevant prongs, the doctrine of collateral estoppel — as well as ineluctable logic — required the Second Circuit to reject the efforts of petitioners to relitigate the precise same issues that had been decided in the state courts.

Petitioners attempt to characterize the application of collateral estoppel in this case as an abdication of duty by the federal courts. The truth is just the opposite. This Court has clearly stated that federal courts *must* give estoppel effect to issues and claims resolved in the state courts. *See Migra,* 465

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permit us to say with precision how many additional sites exist, a substantial number do."); *Walnut Properties v. City of Whittier*, 861 F.2d 1102, 1107 (9th Cir. 1988) ([T]he district court made no findings with respect to the actual number of potential sites available . . . . However, that deficiency does not hinder us because we can roughly estimate the number of available sites . . . .").

U.S. at 84; *Allen*, 449 U.S. at 95-96. Not only does the doctrine of collateral estoppel conserve judicial resources, "but [it] also . . . promotes the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95-96. The decision of the Second Circuit to hold petitioners to issues as litigated in the state courts served the interests of federalism as well as judicial economy and common sense.

THIS COURT SHOULD NOT OVERTURN, NOR NEED IT REVISIT, RENTON.

Since *Renton* was decided only a little over than a decade ago, the lower courts have relied on its clear precepts to evaluate the constitutionality of dozens of municipal ordinances. The instant case is well within the mainstream of these cases, and there is no reason to revisit *Renton,* let alone overturn it.[3] Under *Renton*, as well as the identical state standard, the zoning ordinance at issue unquestionably is Constitutional.

Unlike ordinances that test the limits of Constitutional regulation, New York City's Resolution is well within the standards set by this Court; indeed, it leaves space to

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[3] Petitioners urge this Court to intervene by claiming a "conflict" between the Second Circuit and two opinions of the Fifth and Ninth Circuit courts of appeals. *See, e.g.,* Petition of the Hickerson Plaintiffs for Writ of *Certiorari* at 14 (citing *Topanga Press v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994); *Woodall v. City of El Paso*, 49 F.3d 1120, 1127 (5th Cir. 1995)). Such a conflict is belied, most obviously, by the fact that every court that has ruled on the Resolution thus far — including the Second Circuit — has cited these two cases in its discussion of the First Amendment without perceiving any conflict with other circuits or shortcoming on the part of the ordinance. Moreover, to the extent that these cases do purport to exclude land that is physically or practically unavailable — *e.g.,* underwater or allocated for airport use — New York City's 4 % figure represents land available *after* the exclusion of properties unlikely ever to become available for commercial use from its initial figure of 11%. *See Stringfellow's II*, 694 N.E. 2d at 419.

accommodate far more than the number of establishments that may seek to relocate. As the Second Circuit noted, New York City offered evidence that, *"after excluding land identified by the City as being unlikely to be developed for commercial use,* 4 % of the total land area of the City remained open to adult establishments . . . [A]fter factoring in the Zoning Amendment's 500-foot buffer zones, over 500 potential sites remained available." *See Hickerson v. City of New York*, 146 F.3d 99, 1078 (2d Cir. 1998) (*"Hickerson II"*) (emphasis added) (citing *Stringfellow's II*, 694 N.E.2d 407 at 418). The Second Circuit recognized that the ordinance leaves no shortage of alternative avenues of communication, given that "this land could accommodate . . . approximately *three times* the number of establishments that currently exist." *Id.* at 109. In agreement with the district court and each of the state courts, the Second Circuit accepted the City's evidence that all the areas in Manhattan zoned for adult use and 80% of the land in other boroughs are within a 10-minute walk from a subway line or major bus route.

In lieu of presenting this Court with reasons to overturn a carefully considered ruling of recent vintage, petitioners here simply have tried to relitigate matters flatly disposed of by *Renton*. The essence of their petition to this Court is not, as they claim, that any conflict or departure from judicial norms necessitates resolution by this Court. Rather, it is that petitioners seek to overturn *Renton* itself.[4]

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[4] Ironically, in light of their attack on *Renton*, petitioners argue that they have been estopped from urging the reconsideration of federal free speech standards. In fact, petitioners lobbied for a modification of the First Amendment standards set forth by this Court before both the district court and the Second Circuit, pressing the novel argument that *Renton* requires cities to identify specific sites, and asking the Second Circuit to conduct an unprecedented borough-by-borough analysis of the ordinance. The current posture of this case itself is the clearest evidence that, far from being forced to subsist under an unreviewable decision of the state court, petitioners remain free to urge their interpretations of *Renton* and its progeny upon this Court, as they unsuccessfully did in three state courts, the district court and

That petitioners seek to overturn *Renton* is evident in that their interpretation of governing law is the same as that of the Ninth Circuit in *Renton* itself. But this Court *reversed* the decision of the Ninth Circuit, which had struck down the city of Renton's ordinance in part because the 520 acres of available land included a sewage plant, a horse racing track, a business park containing only buildings suitable for industrial use, a warehouse, an oil tank farm, and a fully-developed shopping center.[5] In *reversing* that decision, this Court commented that the land available included "acreage in all stages of development from raw land to developed, industrial, warehouse, office, and shopping space . . . ." Here, in direct contravention of *Renton*'s teaching, and instead in accordance with the methodology rejected in *Renton*, petitioners' expert excluded land that is industrially zoned, zoned for warehouses, currently used as a parking or storage lot, subject to a long-term lease, currently housing hazardous waste, or requires a permit to change its zoning classification.

Ignoring for the moment the fact that petitioners' strategy is in derogation of the rulings of countless lower courts, it also is in blatant disregard of *Renton*'s clear mandate that the fact that adult establishments "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." *Renton*, 475 U.S. at 54. At bottom, all of petitioners' mischaracterizations of governing law and attempts to exclude viable relocation sites on the basis of factors deemed impermissible by this Court amount to one thing: an end run around *Renton*. That is why they have attempted to force a strained, impracticable standard for assessing alternative

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the Second Circuit.

[5] *Cf.* Petition of the Hickerson Plaintiffs For Writ of *Certiorari* at 8 (criticizing relocation sites offered by the City including "Manhattan's Flower District . . . the Rockefeller Center Complex . . . Bronx Terminal Market, Hunts Point Sewage Treatment Plant," *etc.*).

locations on every court that has rejected their claims. That is why they fought so hard to litigate in state court in hopes that they might evade *Renton* altogether.

Petitioners do not seek the protection afforded by the First Amendment. Rather, they seek protection that exceeds the protection afforded to all other businesses subject to zoning: to wit, specific retail locations guaranteed to be immediately available, desirable, and economically viable. This Court should not indulge that demand at the expense of its own precedent, the law of the circuits, and the "high respect" to which a city's attempt to preserve the quality of urban life is due. *Renton*, 475 U.S. at 50 (citing *Young v. American Mini-Theatres*, 427 U.S. 50, 71 (1976)).

CONCLUSION

For the reasons stated above, the petitions for a writ of *certiorari* to review the decision of the Second Circuit should be denied.

December 2, 1998

Respectfully submitted,

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